No. 3077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HATTIE HARDESTY CHAPMAN,

Appellant,

vs.

R. M. SIMS, Trustee in Bankruptcy of The Realty Union, a Corporation, Bankrupt.

Appellee.

BRIEF FOR APPELLEE

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As a part of our brief, we will call the Court's attention to the opinion of Judge Rankin. (Trp. p. 242, 247) and to the opinion of the Referee (Tr. p.p. 219, 240).

But for more reasons than are stated in those opinions the appellant is not entitled to relief.

Most of the material facts in this case are to be found in the Referee's Certificate on Petition to Review, found at pages 219 to 240 of the Transcript. In this certificate the Referee has summarized most of the evidence supporting the recitals or findings contained in the Order of the Referee, found at pages 194 to 212 of the Transcript.

The property in question lies in the City of Oakland,

has a frontage of 253 feet 8 inches on Telegraph Avenue and a uniform depth of 125 feet. This property was transferred to the representatives of The Realty Union, Bankrupt, by the appellant, Hattie Hardesty Chapman, and by one William Carlton Wallace, and it is claimed that out of these transfers a vendor's lien upon the property arose in favor of Hattie Hardesty Chapman. Two deeds were made. The exact dates of the deeds will be given. The facts in regard to the condition of the title, the encumbrances thereon and these transfers were all matters of record and the Court will observe that in the Order of the Referee all of the facts in regard to these matters are set forth in chronological order.

Counsel for appellant, in referring to the record that was offered, criticize the volume of the evidence, but all of the evidence was important for the purpose of showing the nature of the business transacted by The Realty Union and the nature of the deal between The Realty Union and the appellant, which resulted in a transfer of the property. It conclusively appears from the summary of the facts set forth in the Referee's Certificate and it conclusively appears from the evidence, which we shall hereinafter quote, that the Realty Union was a corporation doing business with money, contributed in a large measure, if not entirely, by persons acquiring from such company what were called "Paid Up" or "Installment" Investment Certificates. The paid up certificates were paid for in full by the investor upon receipt of the same. Other investors were induced to acquire installment investment

certificates. The name of the concern was The Realty Union, and the name typified in a way the nature of the business transacted. The business of the company was acquiring real property, holding it for a rise in the market and selling it at a profit and this profit was to be distributed not only among its stockholders, but also among its investment certificate holders. The business was for the investors. There was a union of interests. It was promised in these certificates that the holder would receive interest at 6 per cent. per annum; if the dividends of the company exceeded six per cent per annum, the investment certificate holder would receive interest in addition which would make his total interest equal the total dividend. Real estate, moneys and other property were turned over to this company by investors upon the assurance of the company that its business was as aforesaid and that the real property was being handled for the common benefit of the certificate holders, was a security standing behind the certificates. The certificates were in the same form although of different series as indicated by the lettering and numbering thereof. It was undoubtedly the expectation of every person receiving one of these certificates that his rights in the property of the company were the same as those of other certificate holders and that there was no preference or discrimination, express or implied.

The negotiations which resulted in the transfer of the property in question to The Realty Union began in February, 1912, and were consummated about the first of

June, 1912. As appears from page 240 of the Transcript, about June 29th, 1912, the concern had received from investors about $457,038.19. About Deecember 31, 1912, this increased to $550,484.69. About December 31, 1913, the amount was $774,012.30 and about December 31, 1914, the amount was $858,769.76. The Realty Union was adjudged bankrupt on September 11th, 1915, upon an involuntary petition. The failure was almost complete. But a trifle can be saved for the certificate holders.

There was no substantial evidence that the agreement with the appellant was that she was to be paid in anything other than investment certificates. In other words she agreed to become one of the "investors" in the company and its business, and she took and accepted the benefits of the investment certificate and received interest thereon for several years before raising the point that she had a vendor's lien. She took an investment certificate payable in ten years from date and not until she saw that the financial crash was inevitable did she endeavor to take back her property and claim a vendor's lien. She seeks to set herself up as a preferred creditor with a security upon real property which was used as the basis for the sale of certificates for thousands of dollars. We shall show her demand is most inequitable. Both the Referee and the learned District Judge in passing upon the evidence so held.

We shall briefly summarize the facts in regard to the title and the transfer of the title to the Realty Union.

On February 23, 1912, the land in question was owned in part by William Carlton Wallace and in part by Hattie Hardesty Chapman. The north 53 feet 8 inches of the Telegraph Avenue frontage was owned by Wallace, his lot having a depth of 100 feet. The balance of the tract belonged to Hattie Hardesty Chapman.

On February 23, 1912, the property in question was burdened with debt, and it was not producing a dollar of income and was about to be lost for the debts piled upon it. Wallace got part of it into the hands of plaintiff and she put on an additional mortgage. It is this property for which investment certificates were taken which *were to be payable in ten years and which counsel is asking this court to convert into* $19,000 *in gold.*

The encumbrances were as follows:

1. Mortgage, dated Dec. 1, 1905, for $6500, to Farmers' & Merchants Bank of Oakland.
2. Mortgage, dated Sept. 28, 1906, for $1000, to E. J. Dinkelspiel.
3. Deed of Trust, dated July 1, 1909, for $6000, in favor of Serena N. Gardner.
4. Mortgage, dated Sept. 3, 1909, for $1000, in favor of Leander R. Webster.
5. Judgment entered Jan. 15, 1912, for $392.95, in favor of Ransom-Crummey Co.
6. Mortgage, dated Sept. 26, 1911, for $917,89, in favor of E. J. Dinkelspiel.

Following February 23, 1912, the following events transpired:

1. William Carlton Wallace and Hattie Hardesty Chapman, on Feb. 28, 1912, deeded the north 153 ft. 8 in. of the entire tract to Caro Mills of the Realty Union. *This included the Wallace Tract.*
2. Thereupon a release of the Leander R. Webster $1000 mortgage and of the $6000 Serena N. Gardner trust deed (which instruments covered the north 153 ft. 8 in.) was obtained and on April 12, 1912, Caro Mills executed a new deed of trust for $5000 in favor of the Union Savings Bank on the same piece.
3. On May 29, 1912, Caro Mills deeded the north 153 ft. 8 in. to Roosevelt Johnson and on June 29, 1912, Johnson deeded it to the Realty Union.
4. On May 28, 1912, Hattie Hardesty Chapman deeded the south 100 feet of the tract in question to Roosevelt Johnson.
5. On June 29, 1912, Johnson deeded both tracts to Realty Union.
6. On June 10, 1912, a release of both Dinkelspiel mortgages was recorded.
7. On June 20, 1912, the mortgage to Farmers and Merchants Savings Bank was released.

Then followed other mortgages and trust deeds, as is fully recited in the order of the referee.

It fully appears that the Realty Union paid off a lot of debts for which Wallace and Miss Chapman were liable, and the property responsible and without any question being raised the property was mortgaged and re-mortgaged by the Company.

For a part of certificates in question, appellant never rendered a dollar of consideration. For a part of these certificates she never deeded a particle of property to Caro Mills or to Johnson or to the Realty Union. Yet she is before this court asking for $19,000 after having agreed to become and be an investor in this concern exactly as every other person did who exchanged land for certificates or who paid cash therefor.

The $10,000 certifiate issued to Hattie Hardesty Chapman on June 6, 1912, reads as follows:

"No. 10219. E. $10000

Investment Certificate,
issued by
THE REALTY UNION
Incorporated 1910, under the Laws of California.

Ten years after date, THE REALTY UNION promises to pay to HATTIE HARDESTY CHAPMAN of Alameda, California, TEN THOUSAND DOLLARS with interest at the rate of six per cent. per annum, payable monthly, and whenever dividends paid its Capital Stockholders exceed six per cent. per annum, the rate of interest paid hereon for the same periods shall be increased to equal the rate of said dividends.

6 per cent. GOLD 6 per cent.

This Certificate is transferable only upon endorsement and surrender. Any owner of Investment Certificates of a paid up value of not less than $100.00 may exchange them for unimproved realty held for sale by the Corporation.

IN WITNESS WHEREOF, The Realty Union has caused this Certificate to be signed by its President or Vice-President and by its Secretary and countersigned by its Auditor at its office in the City

and County of San Francisco, State of California, this sixth day of June, 1912.

Jesse B. Fuller, Secretary.

Roosevelt Johnson, Vice-President.

(Corporate Seal)

Countersigned by

G. W. Fanning, Auditor,

UNITED STATES OF AMERICA."

The $9000 Certificate is in the same form.

This court is powerless to remove from this contract the terms which the parties built into it. To say that this instrument is a mere "promissory note", as counsel for plaintiff persist in calling it, is to trifle with both the law and the facts. It was a contract that the parties had a right to make. It was accepted and it was held for three years *and interest taken under it.*

I.

Plaintiff, by taking a Contract, which entitled her to land other than that which she disposed of, took security within the meaning of the law of vendor's lien.

A vendor's lien is of course waived if the plaintiff takes security for the debt. The waiver results even though the security is legally defective, for although the security is defective, there cannot be an intent to look to the land only for the debt if there was an effort to take secur-

ity. Hence, before Section 3046 C. C. was adopted, the courts of this state had arrived at this conclusion:

> "When he (the vendor) *looks* to other security, he loses his tacit lien."
>
> Hunt vs. Waterman, 12 Cal. 301, 305.

The opinion was concurred in by Field, J., who also concurred in the case next following which laid down the same rule, that is, that the taking of a void mortgage waived the lien.

Camden vs. Vail, 23 Cal. 634.

A vendor is deemed not to have "looked" to the security of the land when he looks to other security.

If there is "any other independent security" than the mere promise to pay the price, the lien is absolutely waived.

Baum vs. Grigsby, 21 Cal. 173,176.

Where a note of a third person is given, the lien is gone. The vendor cannot look to such note and also to the real property. The lien is fragile and if other property is looked to it is gone.

Jones vs. Allert, 161 Cal. 234, 237.

The Code creates no lien that did not exist prior to the codes.

Claiborne vs. Castle, 98 Cal. 30, 33.

It would be indeed remarkable if a vendee buys land and gives to the vendor the worthless note of John Doe

as a thing which, by suit, he may or may not realize something out of, there is no vendor's lien, and yet, if what the vendor gets out of the vendee is a contingent contract to give him land for the amount of the note, the vendor may claim a lien. It was held by the Referee and by his Honor, Judge Rudkin, on review, that the provision for exchanging real property for the certificates was simply another means of paying a debt. But this does not dispose of the point. It amounts to treating an obligation as a right. It is exactly like calling "black", "white" to say that I have a right to pay a debt in money or in houses when my contract says the person entitled to money from me *may* demand payment in any of my land if I should ever seek to sell it. We ask the court to read these certificates carefully. It will find in them not one word that confers any right upon the Realty Union to pay the plaintiff in anything other than money. *Hattie Hardesty Chapman got the right to hand to the Realty Union at any time it might ever elect to sell any of its property the certificates in question and receive therefor the face value of her certificates in land, no matter what the remaining debts of the company might be. That this right was something, that it was a right of action, maturing like any contingent liability matures, is too plain for argument.*

Under the laws of this state there is no illegality in encumbering land with a perpetual option.

Smith vs. Bangham, 156 Cal. 359.

If a vendor takes a promissory note of another when

the bargain is made, he waives the vendor's lien in the absence of an express agreement.

Avery vs. Clark, 87 Cal. 619,
Jones vs. Allert, 161 Cal. 237.

It is not material that it is a valueless note, it is not material that the maker is but contingently liable. The point is the vendor does not look solely to the land. If the vendor should take a note of another, which note would become due, when a land company begins the sale of its land, it would be absolutely absurd to contend that the taking of such a note meant nothing in the way of security. It would be a good chose in action. There is not the slightest particle of doubt about that. Of course the contingency defeats the legal quality of negotiability but not the fact the note is a note. Promises may depend on all sorts of contingencies.

> (B) Effect of Making Payable on Happening of Contingency. If the time for payment is contingent or conditional the paper will be non-negotiable; but instruments that seem to be conditional are often construed to be payable on demand or within a reasonable time, *and paper may be made payable on the happening of any event which must happen, however, remote or uncertain the time.* Thus it may be payable on a designated person's death, but not on his coming of age, or on his marriage, since these events may never happen. The completion of a railroad or building, the arrival of a public ship, or the declaration of peace, has seemed to the courts sufficiently certain to render an instrument payable on that event negotiable, and if the instrument is made payable "on the return of this certificate" it is still unconditional and negotiable. But the con-

trary has been held as to the settlement of a private estate or business, the arrival or departure of a private ship, or the time when the legislature shall have validated certain bonds, and a bill or note made payable after the election of a certain president is said to be a wager contract and void."

7 Cyc. 597, 599.

The text means the contingencies named merely destroy negotiability. Other illustrations are given in the foot-notes.

"When able", "when convenient", or equivalent expressions have been held to destroy negotiability (Humphrey v. Beckwith, 48 Mich. 151, 12 N. W. 28 ("not to be paid * * * unless * * * can make it convenient"); Rowlett v. Lane, 43 Tex. 274 ("at the earliest possible moment"); Salinas v. Wright, 11 Tex. 572 ("so soon as circumstances will permit me"); Ex p. Tootell, 4 Ves. Jr. 372 ("at such a period of time that my circumstances will admit") and, under an endorsement by the payee of a promise not to compel payment but to receive the amount when convenient for the maker to pay it, it has been held that the payee could never maintain an action (Barnard v. Cushing, 4 Metc. (Mass) 230, 38 Am. Dec. 362); but "when able" has been held to mean "on demand if able" (Veasey v. Reeves, 6 Ind. 406), a note for money "which I promise to pay as soon as I possibly can" has been held to be due at once (Kincaid v. Higgins, 1 Bibb (Ky.) 396), *and it has been held that the meaning of a note "payable at my convenience, and upon this express condition, that I am to be the sole judge of such convenience and time of payment", is not that the money shall become due only at the pleasure of the maker, without regard to lapse of time or the rights of the payee, but that the maker is to have a reasonable time, to be determined by himself, in which to pay*

the note (Smithers v. Junker, 41 Fed. 101, 7 L.R.A. 264. So too Works v. Hershey, 35 Iowa, 340; Jones v. Eisler, 3 Kan. 134; Lewis v. Tipton, 10 Ohio St. 88, 75 Am. Dec. 498).

"When realized"—generally with reference to the fund or sale which the maker looks to—renders the instrument contingent and non-negotiable."

7 Cyc. 597, 598.

It is absolutely immaterial in judging the promise of the Realty Union to accept the certificates for real property that that event was not to occur at a certain specified time, or that that company had some control over the date sales were to occur. Unless this court assumes that the corporation was organized in corruption to destroy and rob its stockholders, unless it assumes this in the absence of any allegation of fraud and in spite of the legal principle that fraud is never to be presumed unless pleaded and proved, it must hold that it was the honest intention of Realty Union to sell off its real property. Its business, conducted on behalf of its stockholders *and on behalf of its investors,* was to acquire real property, hold it and sell it. In no other way could it pay its investors six per cent, or any per cent., or a share of profits when they exceeded six per cent. We insist that the law absolutely requires that the court follow the presumption which prevails in the absence of evidence to the contrary,—the presumption of fair dealing. If the court follows that presumption, it is bound to say that in June, 1912, when the Realty Union promised to Hattie Hardesty Chapman that when it sold its property she would have the right to take property for certificates,

whether those certificates were mature or not, it was a promise of value, and it was a promise that meant something, *a promise that extended to properties other than the land sold.* She "looked" to other property than the land sold. Of course hind-sight is profound, and sometimes smart, and it enables counsel to say that the promises of the company and the right of claimant, by virtue of those promises, amounted to nothing. If the Realty Union had offered its land for sale, the promise would not have been valueless. It would have matured the debt and a most desirable piece of property might have been obtained. The fact that it was conditional or contingent, that the scheme did not work out, lessens its legal effect not one particle. A better piece of land might have been obtained.

> "c. *Conditional Upon Future Event.* Contracts may also be conditional upon the happening of some event, the happening of which is certain, but the time of happening of which is uncertain, or upon the happening of some event or contingency which is altogether uncertain; as in the case of a contract to pay money when a certain residuary share of an estate comes to the hands of the payee, so that the amount thereof can be ascertained; a contract to purchase 'provided titles can be approved and made'; a subscription to a particular purpose, provided a certain further sum is subscribed; a sale of goods at auction to be paid for in an approved note at six months; or a sale of goods if the seller has the goods on hand at the time. Where a debt is in fact due, and it is agreed that it shall be paid upon the happening of a future event, and the event does not happen, it is held that the law implies a promise to pay within a reasonable time.

d. *Conditional Upon Specified Fund.* A contract or promise to pay may be restricted to a particular fund, so as to make the raising or the sufficiency of the fund a condition precedent to the liability; as in the case of a promise or covenant to pay money, if the capital and funds of a company are sufficient, or out of the calls upon the shares of the company; or a promise to pay out of the rents of a certain building; and like cases.

e. *Conditional Upon Request or Demand.* A contract may be conditioned upon a request or demand of performance. The making of the request or demand is then necessary to render the contract absolute, and in an action for a breach of the contract it must be alleged and proved. An action is not sustainable upon a note payable in specific articles on demand, without proof of a special demand. On a promise to deliver goods, where no time is mentioned, a demand is necessary before beginning suit. Unless the contract so provides the demand need not be in writing.

f. *Conditional Upon Notice.* A contract may also be conditional upon notice of some matter being given; and notice must be given accordingly, in order to render the promise absolute, and must be alleged and proved in an action brought upon it.

* * * * * * * *

g. Conditional Upon Act or Will of Third Persons. A promise may be conditional upon the act or will of a third person."

9 Cyc. 615, 617.

Let us suppose that the plaintiff's land had been the only land sold to this corporation;—and of course we have the right to judge of the effect of this contract

under every condition;—let us suppose further that it had comprised several parcels and was disposed of at a figure of $100,000 and certificates were taken therefor, let us suppose that because of bad business conditions the company concluded that it should sell its land; would any court hold that the certificates of Hattie Hardesty Chapman would not at once absorb the land? The plain truth of the matter is, the company entered into a solemn obligation with Hattie Hardesty Chapman that prevented it from selling its lands without giving her and her co-holders of certificates virtually the preferred right of purchase. The certificate was not government scrip, but it was private corporate scrip. It was scrip, nevertheless. To ignore this feature of the contract is to tear it in part, is to refuse to analyze the contract made, to consider its terms, and accord to them the meaning which appellant finally confessed she knew those terms had.

It is no answer to the argument made that this plaintiff took a contract for land to say that it related to no particular piece of land, *for the very instant the land was for sale and she selected her land, she perfected the right to enforce specific performance, a right given by contract.*

> "A contract giving one of the parties the right of selection of the lot or lots to be conveyed is not incapable of specific performance."
>
> 36 Cyc. 595.

The federal government and some of the state governments have had occasion to issue contracts called "scrip", which may be used by the holders thereof in

acquiring public land. This scrip has been issued for services and also for land surrendered or lost. The holder, through the use of it could select and acquire other land for that which he had surrendered, or the title to which had failed. No one has ever suggested that such contracts were valueless. If the federal government,—as it formerly did,—should from time to time offer its lands for sale at public auction and it had outstanding contracts permitting the holders thereof to turn such contracts in for a certain quantity of land, it was to sell, it is entirely clear that such outstanding contracts would be of value. Hattie Hardesty Chapman, in addition to the promise to pay money at a remote date, took a contract permitting her to mature and discharge her debt by applying the amount of it towards the title to other land. The procedure that she might pursue to reach out and take other property to make secure the payment of her debt is altogether immaterial. The material thing is that there was a contingent contract for that which secured the payment of the debt or some part of it.

It is of no moment that the plaintiff failed to perfect her right by making actual selection before bankruptcy. It is not necessary in order to establish that a vendor's lien was waived to show good security or legal security. If the vendor looks to an independent method of bringing about a settlement of the debt, the law will not presume that he looked to the land for it. If the vendee gives him a contract showing he looks to an independent method of settling the debt, the law does not raise for him the equity

of a lien. If he has a contract capable of execution and which if executed would give satisfaction of the obligation, equity will not aid him by raising the lien.

Hattie Hardesty Chapman received a claim on the property of the Realty Union so substantial that not a title company in existence would have passed title for another purchaser, if she had but given notice that she intended to take the property offered for sale by turning in her certificates. And her claim would not have been meaningless.

The right created was not the right of the Realty Union to exchange land for the certificate, it was not a method of payment exercisable by the Realty Union as of right to pay the debt in land. It was nothing of the sort. The right,—a *right* conferred in the way rights are generally conferred,—was a *right* created by contract in Hattie Hardesty Chapman. The contract was accepted and acted upon by the taking of interest under the contract. If Hattie Hardesty Chapman owned a piece of real property and owed the Realty Union $1000 and gave that company a contract that when, or if, she sold her land the Realty Union should be privileged to turn the debt in for the land, would she feel that her land and her rights were unburdened? If the contract extended to all the land she owned, would she feel that her lands and her rights therein were free from claim? Is it not plainly the theory of the law of vendors' liens that the party must not look to property beyond the property sold? Can a court hold that the intent of the parties to

a contract is something outside of and *beyond legal intent,*—intent following from the unambiguous meaning of the words used? We most respectfully urge that Hattie Hardesty Chapman, when she made the deal in question took of and from the Realty Union a certain *right,* that she took it through the terms of a written contract, that if a contract is in writing the terms thereof control. And of course the court should observe the rule that the contract is not to be judged in the light of what afterwards occurred.

> "A court of equity cannot undertake to set aside the deliberate contracts or obligations of parties fairly and freely assumed because time may show that the obligation was onerous or unprofitable."
>
> Parsons vs. Smilie, 97 Cal. 647, 657.

> "It remains only to consider whether there was any unconscionable advantage taken of the plaintiff. This question must be determined, not in the light of subsequent events, but upon the circumstances existing at the time of the negotiations and the execution of the contract."
>
> Colton v. Stanford, 82 Cal. 351, 403.

We are not called upon to argue the question of the right given under the certificates. After repeated effort to appear ignorant of the contents of the certificate, Hattie Hardesty Chapman herself testified:

> "Q—Well, you looked at your investment certificate, and you understood that your investment certificate entitled you to call upon them for a statement of their properties, and entitled you to ex-

change, if they had any for sale, didn't you? A—Yes, sir."

Tr. p. 89.

Not a contract for land? Had Hattie Hardesty Chapman got the list she wanted and the land had suited her, would this court have heard of this suit? And if not, why? Because she had a contract that enabled her to get other land. That the contract was contingent and not absolute lessens not one particle its effect in preventing the transaction from being one in which the naked promise of the vendee to pay the price was taken.

II.

The nature of the Contract shows the lien was waived.

Section 3046 C. C. does not mean that a vendor's lien is preserved in every case, unless security is taken. The section is absolutely no enlargement upon common law principles.

Claiborne vs. Castle, 98 Calif. 33.

The slightest analysis of the rights of the holders of the hundreds of these certificates shows that the lien was waived. It was waived because the scheme and plan was to create a common fund which extended value to all certificates with absolute equality as regards interest paid and dividends paid and as regards the liability of

the properties to absorption by certificates. Every certificate holder was referred to as, and he was in truth, an investor. Each certificate called attention to the existence of other certificates. When a person put in his money or his land, and he received his certificate he was an investor and he had something of value. The reports of the company always declared the holder an investor. He was such. *That the certificate holder could have sued for an accounting no sane person would deny.* His contract gave him a direct and personal interest in the profits of the company in addition to his right to take from the property any of its land in exchange for its realty if it endeavored to sell it.

The opinion in the case next cited, which case was decided after the Finnel case, is very significant:

> "The respondents point to *various* elements of the transaction to support the contention that the plaintiff waived any lien. Without considering separately such arguments as that the plaintiff took security or that the contract did not make the vendee liable for any liquidated purchase price measurable in terms of money, we have no hesitation in declaring our conviction that *the contract, viewed as a whole, evidences a scheme or plan of dealing which is inconsistent with the retention by the vendor of any lien on the properties.* That scheme, briefly stated, was this: The mines owned by plaintiff, were to be conveyed, free and clear of encumbrance, to Van Ee. Van Ee was to form a corporation, and to transfer the properties, likewise unencumbered, to it. Ninety per cent. of the shares of stock of such corporation were to be deposited in a bank, to be dealt with in a given manner. These shares were to

be subject to sale by the vendee or his associates, but a stated proportion of the sum realized on any sales was to go to the plaintiff in satisfaction of the consideration stated in the agreement. Similar provision was made with reference to a percentage of the proceeds arising from the operation of the mines by the vendee or his assigns. The number of shares to be deposited was 225,000, of the par value of one pound each. Sales of these shares were to be made at not less than their par value. In other words, the agreement contemplated that title apparently free and unencumbered should be conveyed to a corporation which should, *upon the basis of such title,* issue and sell its shares to an amount exceeding a million dollars. The plan called for a nominal capitalization of about three times the prices which plaintiff was willing to take for its properties, and provided that the shares should be sold to the public at a rate which would bring in an amount equal to or exceeding their face value. What may fairly be supposed to have been in the contemplation of the parties to this agreement? Did the plaintiff and Van Ee intend to sell to prospective shareholders, at this price, an interest in a property which was subject to a paramount, but unrecorded, lien for $340,000, or did they propose to offer at par, shares in a corporation owning a clear title to the property? A reading of the agreement leaves no doubt that this question must be answered by saying that no secret lien in favor of the original vendor was intended to be retained. In re the Brentwood Brick & Coal Co., L. R. 4 Ch. Div. 562, was a case in which property was conveyed to a corporation for a consideration of six thousand pounds, to be paid by the payment to the vendor of fifty per cent of all money by way of capital to be at any time borrowed by the company, until the six thousand pounds should be paid. The transaction was held *to be such as to exclude the idea of the retention of*

a vendor's lien. Referring to the provision for payment out of proceeds of shares sold or money borrowed, James, L. J. said: 'To my mind it is clear that he intended to rely on that fund for payment, *and intended that the company should have the means of borrowing. This is quite inconsistent with a lien which would probably make the company unable to pledge their property.*' The reasoning applies with equal force to the provision here for the sale of 225,000 shares at not less than their par value. Neither the plaintiff nor Van Ee could have considered it feasible to market at par any part of an issue of 225,000 one-pound shares of a corporation owning no assets beyond an equity of redemption (worth perhaps $60,000) in a property subject to a lien of $340,000. Again, the covenant that the plaintiff's conveyance to Van Ee, and his subsequent transfer to the British corporation should be free and clear of encumbrances excludes the idea that a title subject to a lien in favor of the plaintiff was to be retained. It is true that in Slide & Spur Gold Mines v. Seymour, 153 U. S. 509, (14 Sup, Ct. 842), it was held that a somewhat similar covenant was to be construed as referring 'to prior charges and encubrances' and not to 'any which arise out of the conveyance itself.' But in that case there was but a single transfer directly from the vendor to a corporation organized by the vendee to take title. Here the property was to be conveyed to Van Ee, and by him to a corporation. Even if we give to the covenant for a transfer free of encumbrances the restricted meaning applied in the Slide & Spur case, the vendor's lien claimed must have attached at the moment of the transfer to Van Ee. It would, therefore, have been prior to the conveyance by Van Ee to the British corporation, and was excluded by the provision that that transfer should be free of encumbrance.

> But apart from this somewhat technical consideration, *we prefer to rest our conclusion on the broader ground that the whole scope of this agreement, differing materially from that in the Slide & Spur case, is such as to make the execution of a vendor's lien inconsistent with the proper execution of the plan agreed upon.*"
>
> Royal Con. Min. Co. v. Royal Con. Mines, 157 Cal. 737, 747, 749.

Counsel will contend that the controlling feature of the case was that the property was to go to the corporation free of lien. Judge Sloss expressly declined to put his opinion upon such ground. We ask the court to bear this in mind in considering this case.

The general scheme shown by the transaction may indicate no vendor's lien is reserved.

> Brown vs. Gilman, 4 Wheat. 256, 4 L. ed. 564.

The case last mentioned disclosed a certificate issuing scheme.

In the federal case next mentioned there was a covenant to transfer town lots which had not as yet been laid out and which would not be laid out until the vendee acted. It was said:

> "One of these quite apposite to the case before us is thus stated in Snell's Principles of Equity (2d Ed.) 109, as the "true rule":
>
> 'Although the mere giving of a bond, bill, promissory note or covenant for the purchase money, or the granting of an annuity secured by bond or cov-

enant, will not be sufficient to discharge the equitable lien, yet where it appears that the note, bond, covenant or annuity was substituted for the consideration money, and was in fact the thing bargained for, the lien will be lost."

For a technical statement, it would seem to have been more accurate to say that in such circumstances no lien would be implied. But in substance it no doubt states the settled rule of law in England and is the prevailing law in the United States."

Welch vs. Farmers' Loan & Trust Co., 165 Fed. 561, 565.

Where land is disposed of for shares of stock and no time for delivery of the stock is fixed, the vendor's lien is waived. The law implies the stock will be delivered in a reasonable time. If the stock proves worthless, the lien is nevertheless waived.

Greenberg v. California B. R. Co., 107 Cal. 667.

In this case the court said: p. 673.

"It certainly could not have been the intention that these parties should sell their land to the corporation for a definite number of shares of its capital stock, and that they might leave their stock unissued in the hands of the corporation, so that if the corporation was prosperous, and its stock valuable, that they would then take it; but if the corporation became involved they might possibly escape liability as stockholders by refusing to take it upon the ground that the stock was not of the value they contracted for, but hold the land as security for its alleged value by a proceeding to foreclose a vendor's lien."

Greenberg v. California B. R. Co., 107 Cal. 667.

We ask the court particularly to note *that one of the conditions in the contract which Hattie Hardesty Chapman took was a right which pertains to a share of stock.* When the dividends of the company exceeded six per cent. she was to share in the excess. If it had made 100 per cent. she would have received $38,000 for her land.

> "The conveyance of real estate to purchasers, who, with the knowledge and consent of the seller, buy for the purpose of reselling to third persons free from incumbrances is inconsistent with a purpose on his part to retain a vendor's lien, and is an implied waiver of the lien."
>
> In re V. & M. Lumber Co., 182 F. 235.

In the case the court went on to note that the intention evidently was to convey to a corporation composed of the grantors *only* and threfore the rule would not apply. But here it was as plain as daylight that Hattie Hardesty Chapman and her agent, Wallace, knew exactly what they were doing. *They were turning the property into the corporation not with an obligation restricting and burdening it for a ten-year period but knowing it was to be held and sold whensoever the company saw fit and without obligation to hold in reserve, the purchase price for a ten-year period.*

We call the court's attention to the following testimony:

> "Q—Now you are quite distinct in your impression that Mr. Johnson told you that they had in mind the holding of this piece of property that they got from you, because they thought it would increase in value? A—Yes.

Q—Well, did you expect, when he told you that, that if it increased in value so that there was a chance for selling it at a good profit, that they would sell it at a good profit? A—*Why sure they would have.* That is business, isn't it?

Q—That is business in that business."
(Tr. p. 86.)

Also the following:

"Q—When this was read to you, Miss Chapman, did you notice that there was in this certificate a promise to pay you something in the way of dividends in the event that the dividends in this company exceeded a certain specified amount? A—Yes, I remember that.

Q—You remember that? You knew that this was a company which was buying and selling real property, didn't you? A—Yes.

Q—And that that was the way in which, if it paid dividends or profits, it was hoping to make them? You understood that, didn't you? A. Well, I didn't think that the dividends would amount to anything, particularly to me, because I thought, well, if they had to make money, why, it would simply increase my interest.

Q. That is, it would simply be added to what you would get? A. Instead of my getting six per cent., why, perhaps they might be able to pay me seven per cent.; something like that.

Q. But did you understand that if this company made money it would make it by buying and selling real estate, didn't you? A. Why yes, that is what I understood.

Q. Well now, as regards this particular piece of property which you turned over to them, you fully

understood that that piece of property would pass right into the usual amount of property which they had, and that they would deal with that just like they would deal with any other item of property, didn't you? A. *Well, I supposed they would try to sell it and I expected them to pay me for it.*

Q. You expected them to pay you for it, but at the same time, knowing the business in which this concern was engaged— A. (Int.) I didn't want to give it to them for practically nothing.

Q. At the same time, you didn't expect them to sit down and hold that piece of property until the end of ten years? A. I didn't know how they were going to get my money to pay me.

Q. But you knew that this concern was a concern, as you have stated, which bought and sold real property? A. Yes.

Q. That was clear in your mind. *And that if it made any of this extra per cent. price or dividends which they referred to, that it would make them by buying and selling real property, any such real property as they had? You understood that, didn't you? A. Why, yes."*

Tr. p. 57, bottom to p. 59, mid page.

"Any act which indicates that it was not the intention of the parties that the purchase money should continue a lien upon the land conveyed is a waiver of the lien."

Dudley v. Dickson, 14 N.J.Eq. 252.

"If, however, the grantee's own bond, note, or other promise is given, not as security for the price, but as a substitute for or in novation of the purch-

ase price, so that no debt for the price any longer exists, the lien is destroyed," etc.

Pom. Eq. Jur. Vol. 3, Sec. 1352.

William C. Wallace was the appellant's agent who made the deal and his testimony shows conclusively that it was distinctly understood that the sale was for certificates and not for cash, or a straight out promise to pay cash.

"So I offered Mr. Johnson, as nearly as I can recall, a proposition like this: that if he would purchase the property for the Union at a price to be agreed upon as being fair—and that was a matter that we could not decide in a minute—that if he would furnish money enough to pay off this indebtedness, that we, the owners of the property—and I assumed to act for Miss Chapman because she was a part owner in the property, though she was not involved in the difficulties therein—*that we would accept for the balance of the payment the certificates of the Realty Union.*"

Tr. p. 136 (bot. page).

"Q—Then as I understand, Mr. Wallace, the Realty Union agreed to pay the liens and taxes and encumbrances upon this property, and 19,700 and some odd dollars, the 700 and some dollars in money and the other $19,000 represented by these certificates which I denominate promissory notes? Is that right? A—Well, put the word "certificates" in, yes, that was the understanding. They didn't *say anything about promissory notes.* That is a matter of opinion.

Q—I very adroitly put the question in that way, "which I denominate promissory notes."

Tr. p. 150, 151.

If it was a case here of a straight debt why did the plaintiff take certificates? Johnson's testimony, which was utterly uncontradicted, tells us the reason why:

> "A. Yes, I showed her that in one case she owns a specific piece of property which may not increase in value, but when she takes a certificate she has an interest in all our properties, scattered over a large district, therefore there is a large chance for an increase in the value, because if one piece does not increase another piece will. Miss Chapman was familiar at that time with the fact that the Realty Union owned a great many properties, for I showed to her that our holdings covered a large distribution."

Tr. p. 120, mid page.

Entering into covenants in lieu of agreeing to pay a certain specific price waives a vendor's lien.

> "Where a covenant of the vendee is substituted for the purchase money or as a mode of payment of the price of land, the land should be held discharged of the lien."

McKillip vs. McKillip, 8 Barb. 560.

We submit that the facts here fortunately permit this court to make a just decision under the evidence and not one that puts Hattie Hardesty Chapman in a preferred class as against poor school-teachers or blacksmiths who put into this concern their hard-earned coin and life savings and not a lot of property that at the time was about to go under the hammer, for attachments, street liens, taxes and past due loans.

III.

Equity will not enforce an inequitable demand.

Authorities need not be cited in support of this contention. The vendor's lien is a mere equity raised by the courts.

> Royal Con. Mine Co. vs. Royal Con. Mines, 157 Cal. 746.

> "The general doctrine gathered from the volume of authority, would seem to be, that the lien will never be permitted to overrule or take priority of the rights or equities of third persons which have in good faith attached in ignorance of such vendor's equity, and in this respect it is utterly unlike a mortgage or any lien created by express contract or even by statute, and as the lien is from its nature secret, unknown to the world, and often productive of harm, it will not be extended beyond the requirements of the settled principles of equity and it not ordinarily encouraged by the courts."

> Warville on Vendors, Vol. II, (2d ed.) Sec. 679.

Equity will not enforce a vendor's lien, where others have adopted position of danger to themselves by reason of the fact it was apparently not to be asserted.

> Larscheid vs. Hashek Mfg. Co., 142 Wis. 172. 125 N.W. 452.

The plaintiff testified:

> "Q. Well, now, let me ask you this: At this time you stated that these properties of yours were unimproved. A. Yes.

> Q. These that you turned over to the Realty Union? A. Yes.

Q. When this certificate was issued to you, you saw that it had a certain number upon it, didn't you? Both of these certificates were numbered? A. Yes.

Q. And you also understood that these investment certificates were a form of document or contract that was being issued by this Realty Union at this time, didn't you? A. I understood that they issued those, yes."

Tr. p. 61.

"Q. That is not a full answer to the question. My question is whether it was your impression that this company had outstanding, other certificates. A. Well, I supposed they had."

Tr. p. 63.

"Q. You saw that they had these lithographed forms? A. I had not thought particularly about that.

Q. What I mean is this: You fully understood that these were not the only two certificates which the Realty Union had issued or was going to issue? A. No, I didn't think they had only two."

Tr. p. 63.

Mr. Johnson, President of the concern, testified:

"It is true, is it not, Mr. Johnson, that all the realty holdings in the Realty Union after June, 1912, at the time of the dealing with Hattie Hardesty Chapman consisted of unimproved tracts of real property. A. Practically.

Q. Practically all? A. There were two pieces that were improved.

Q. And what was the value of those properties at that time? A. About a million dollars.

Q. Did you value them approximately at a million in 1912? A. Yes.

Tr. p. 179.

About the time the appellant dealt with the Realty Union, the investment certificates were $457,038.19 and they ran up to $858,769.76 by January 1, 1915.

Tr. pp. 172, 173.

"Mr. Johnson further testified that in June, 1912, there was outstanding in paid-up certificates of the Realty Union about $600,000 that after June, 1912, more than $100,000 was issued, that the only way the company would have derived anything in the way of dividends or profits would have been by selling its real estate, and they began selling about June, 1914; that the business of the Realty Union practically amounted to acquiring tracts of real property around Oakland and Berkeley, and holding the real property and selling it off at a profit (pages 10-11, Supplemental Testimony). Mr. Johnson identified an official statement of the Realty Union of June 29th, 1912, which showed that the concern had received from investors $457,038.19 in payment of investment certificates. He identified a financial statement of December 31, 1912, which showed received of investors $550,484.69. It was this statement he said that he referred to when he said that the amount received from investors was approximately $600,000. He identified a financial statement dated December 31st, 1914, in which statement under the heading of liabilities is shown "received from investors, $858,769.76" and also one of December 31st, 1913, showing $774,012.30 received from investors. His attention was called to a statement of June 29th, 1912, under the heading of assets, "realty, $1,039,009.65" he testified that this

realty was bought by cash, certificates and other securities. (Referee's Cert.)

Tr. pp. 240, 241.

We ask the court to read the evidence and the certificates and see if there is any way of escaping the conclusion that the plaintiff, in addition to being a participant in the profits of the Company, knew this Company was engaged in issuing to innocent purchasers these certificates which called for the land on its sale or for a share in the profits of the sale. Did she or did she not believe that others believed they were acquiring the same rights which she was ready to exercise? What kind of equity, or what kind of justice will now raise for her a secret lien? We do most earnestly insist that courts sit to uphold honesty and that it would brand a rank and dishonest claim with its approval if it raises the alleged lien. Does this court doubt that those who purchased thousands of dollars worth of certificates after the land in question was turned into the Realty Union, purchased them believing that the lands which were the only thing underlying them were not encumbered with secret liens. The doctrine of bona fide purchaser is not confined to land purchases. It rests on an estoppel.

Where one knows his land is going to be used to float a bond issue, and he is to take some of such bonds he is not in a position to urge that he has a secret lien on the land.

Welch vs. Farmers' Loan & Trust Co., 165 F. 561.

If there ever was a lien, the dishonesty of asserting it now as against the many innocent certificate holders will defeat the claims of plaintiff.

IV.

If the lien ever existed, it was waived by demanding real property for the certificates.

It is to be borne in mind that if a vendor's lien exists it is lost and waived by any declaration or act showing that the vendor is not relying upon it.

> "Section 5 of the Civil Code provides that its provisions, so far as they are substantially the same as existing statutes of the common law, must be construed as continuations thereof and not as new enactments.' (See Churchill v. Pacific Improvement Co., 96 Cal. 490.)
>
> The recent cases of Avery v. Clark, 87 Cal. 619, and Gessner v. Palmateer, 89 Cal. 89, fully discuss this subject, and in effect hold that the code provisions do not change the character of the lien. While in those cases the title still remained in the lienholder, yet the matters discussed were fairly involved, and we again assent to the law as there declared. It is settled beyond dispute that the acts and conduct of a vendor which indicate a waiver of the lien may be shown by parol. The California cases all point directly to this conclusion, and the doctrine is clearly announced in Moshier v. Meek, 80 Ill. 79; Jarman v. Farley, 7 Lea, 141; Jones on Liens, sec. 1073.
>
> Claiborne vs. Castle, 98 Cal. 33, 34.

In the Illinois case cited by our Supreme Court, the parent had taken notes for the land sold, but it was shown he had made declarations indicating he did not intend to enforce a vendor's lien. The court said:

> 'But any act of the vendor which manifests an intention not to rely on such lien, prevents it from attaching or destroys it after it has attached."
>
> Moshier vs. Meek, 80 Ill. 79.

It is wholly unnecessary to show there was any consideration for the waiver and it may be made out by parol proof.

> Claiborne vs. Castle, 98 Cal. 30, 34.

The oral testimony of the plaintiff was that she went to the Realty Union and asked for land. If she ever had a vendor's lien she thus expressly indicated she did not rely upon it. We ask the court to please note the following testimony:

> "Q. But up to that time had you in mind the idea of turning in these certificates and obtaining from the Realty Union some of its unimproved property? A. If I could have gotten good unimproved property I would have taken it. But he told me not to, so I said "all right".
>
> Q. What facts brought to your mind the advisability of turning in these certificates for unimproved property? A. Well, if I could not get my interest, why then I suppose I commenced to worry about it.
>
> Q. But at that time it would have been of no importance to you where the unimproved property was located, so long as it was a desirable piece? Is

not that true? A. Well, I will tell you. I wanted to get this property back that I had sold them. That was what I was trying to do.

Q. Yes. A. And I don't know. He said he was going to give me a mortgage on it.

Q. Was that the occasion that Mr. Aydelotte mentioned in his question to you when the mortgage was mentioned? A. I had so many questions asked me, I don't know.

Q. You answered me a little while ago, that if they had some unimproved real property that was desirable, you were of the mind to turn in your certificates for this property. Didn't you make such an answer? A. Well, yes, if I could have found good property.

Q. If you could have found good property? A. But I wanted to get this property back that I had sold them, because I thought they could not have any better than that.

Q. But if they did have some that you thought was not quite so choice as that, and that was not available, you would have been perfectly willing to accept it? Isn't that right? A. If it was good property, yes."

Tr. p. 87, 88.

V.

A Vendor's Lien is not assignable, and therefore the fact that Wallace attempted to give Hattie Hardesty Chapman his right to the part of the Certificates issued for the North 53 feet

8 inches was wholly ineffectual, and caused a waiver of the lien.

It takes a writing to transfer title to real property. There was no writing. The only showing is an attempt to transfer a right to purchase money.

While it is the law in some jurisdictions that a vendor's lien can be assigned, that is not the better rule. The Supreme Court of the State of California has held in several cases that the lien is purely personal and does not attach in behalf of other persons, where there has been an attempt to transfer to such other persons the benefit of the lien. The opinion in the next case clearly establishing this to be the law of this State was written by Chief Justice Field.

Baum vs. Grigsby, 21 Cal. 173.

> "It is in the nature of a personal privilege, unassignable, which the vendor can assert, only in a suit brought for the purpose of having it decreed and enforced."

Fitzell vs. Leaky, 72 Cal. 477, 484.

Longmaid vs. Coulter, 123 Cal. 208, 212.

The lien does not pass by a transfer of the claim to the purchase money.

Gessner vs. Palmateer, 89 Cal. 89, 92.

The right is not subject to execution and it is not the subject of a private transfer.

Ross vs. Heintzen, 36 Cal. 313, 321.

It is only the express lien resulting from a retention of title by the vendor that is asignable in this State.

Avery vs. Clark, 87 Cal. 619.

The general rule forbids the transfer of the right to a lien for the purchase money.

> "Assignment of Lien. The authorities are divided on the question of the assignability of the vendor's implied lien for the purchase money of the land sold and conveyed. In England and in some of the States of the Union, it is held that the lien is assignable and passes with a transfer of the debt on the principle that the lien is an incident of the debt", etc.

29 Am. & Eng. Encyc. L. (2d ed), 750.

Sections 3046 and 3047 of the Civil Code, taken together, lay down the true principle. The rule cannot be evaded by attempting to make the purchase price payable to a third person. This was expressly decided in the case next mentioned in which the court restricted the right of the lien to the party disposing of the property, and denied the lien to one to whom the price was made payable.

> "* * * * Section 4830, Rev. Codes, says: One who sells real property has a special or vendor's lien thereon, independent of possession, for so much of the price as remains unpaid or unsecured otherwise than by the personal obligation of the buyer." It is apparent from the language of the statute that it restricts the right to the one who sells. Therefore, we are not called upon to express any opinion whether it is a sound doctrine of law that one to whom the vendee has agreed to pay a portion of the price can enforce the lien. See Tyson

vs. Railway Co., 15 F. 763; Thompson vs. Thompson, 3 Lea. 126; Zwingle vs. Wilkinson, 94 Tenn. 246, 28 S.W. 1096; Frances vs. Wells, 2 Colo. 660; Jones Mtg., Sec. 214; 28 Am. & Eng. Enc. Law, 169, note 3. He cannot under our statute, because the plain language is that the lien is given to the one who sells, *and the implication is that no one else is entitled to such a lien.* Our statute was intended to clear up the law on the subject of vendors' liens in this State and cover the whole ground."

Bray vs. Booker, 72 N.W. 933.

Equity will not correct a gift deed.

Fickes vs. Baker, 26 Cal. App. Dec. 641.

Equity will not aid the appellant's claim here. It is conceded and the records show that on February 28, 1912, William Carlton Wallace owned the north 53 feet 8 inches of the land in question, and that this tract so owned by him had a depth of 100 feet. The title to the balance of the property stood in Hattie Hardesty Chapman. On February 28, 1912, William Carlton Wallace and Hattie Hardesty Chapman conveyed to Caro Mills, by grant, bargain and sale deed, which deed was duly recorded in Book 2059 of Deeds, page 44, Alameda County records, the north 153 ft. 8 in. of the tract in question, and the conveyance included the portion of the land owned by Wallace.

Caro Mills was acting for the Realty Union. We have already pointed out that it was obvious that he was to deal with the property as if it was unincumbered property. We have already noted that he caused the

property to be encumbered. On May 29, 1912, Caro Mills deeded the property which he had received from Wallace and Hattie Hardesty Chapman to Roosevelt Johnson. This deed was recorded in Book 2067 of Deeds, at page 266, Records of Alameda County.

On May 28, 1912, Hattie Hardesty Chapman deeded the south 100 feet of the tract in question to Roosevelt Johnson. This deed was recorded in Book 2070 of Deeds, page 258, records of Alameda County.

On June 29, 1912, Roosevelt Johnson and wife deeded the entire tract to the Realty Union. This deed is recorded in Book 2092 of Deeds, page 45, records of Alameda County.

It appears, therefore, that Wallace tried to assign to Hattie Hardesty Chapman his share of the contracts represented by the investment certificates. Under these certificates it is perfectly obvious that the holder looks to other property than the land disposed of as a means of payment, but if the certificates are merely promises to pay the purchase price and if the scheme did not involve an understanding that the company was to have the privilege to deal with the land as if it were free and clear, and that all investors were to have the same equal rights, then it is apparent that no lien attached to the north 53 feet 8 inches, with the depth of 100 feet.

To summarize the foregoing points, we submit that it clearly appears:

1. That the certificates are contracts in writing, that it is an inseparable part of them that the plaintiff took a contingent contract for other land as a means of satisfying the debt and that she speculated for three years upon the right and now seeks to claim it never existed and asks a court of equity to raise a lien for her on the theory that she took no kind of security contract at all; that it is entirely immaterial that her security contract was hedged about with restrictions, that a collateral promise is a collateral promise although it is contingent, uncertain and conditional, that if more than the naked promise to pay is taken, no lien exists, and that a court of equity will not raise the lien if the security contract is worthless in fact or worthless in law;

2. That the code sections are not intended to allow a lien although security is not taken, if the contract is a part of an entire transaction, the full execution of which is inconsistent with the lien; that a common sense or fair interpretation of the certificates was that no one of the holders was to have both a lien on the land he traded for the certificates and in addition a right to lay claim to any other of the land whensoever it might be sold or to the profits of sale, but that the certificate holders were investors with equal rights.

3. That to adopt any other construction of the transaction would also instantly lead to harm and injury to the many other certificate holders whom Hattie Hardesty Chapman knew were buying the certificates on the

faith of the right to have them exchanged for any of the company's land and on the faith of the right to have the company's lands sold so they might share in the profits thereof; that it cannot be denied that the rights of third parties who paid in their money are involved, and that to raise a lien which was kept secret until the financial crash occured and after enjoying the rights of a certificate holder would be most inequitable.

4. The lien was waived if it ever existed when the attempt was made to get the land called for in satisfaction of the debt; that this is true although plaintiff later changed her opinion upon the advice of her attorney.

5. Lastly, the lien could not have prevailed as against the north 53 feet and 8 inches with a depth of 100 feet. But this point while fatal need not be considered because there was no lien at all.

Respectfully submitted,

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